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IN THE

Supreme Court of the United States

OCTOBER TERM 1984

No.

GAY SPRADLEY,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION

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QUESTIONS PRESENTED

I. IS IT A VIOLATION OF FEDERAL RULE OF CRIMINAL PROCEDURE 43 AND A DENIAL OF DUE PROCESS FOR A TRIAL JUDGE TO FAIL TO DISCLOSE TO A DEFENDANT WRITTEN COMMUNICATIONS FROM THE JURY REQUESTING THAT SPECIFIC DESIGNATED TESTIMONY BE READ TO THEM, AND DENYING THE REQUEST *SUA SPONTE* WITHOUT NOTICE TO THE DEFENDANT, UNDER CIRCUMSTANCES WHERE A JURY HAD ANNOUNCED IN AN EARLIER COMMUNICATION THAT THEY WERE FIRMLY DEADLOCKED DUE TO THE CREDIBILITY PROBLEMS OF THE PROSECUTION WITNESSES AND HAD BEEN CHARGED WITH AN *ALLEN* INSTRUCTION?

II. WHETHER AN AGREEMENT TO PROCURE TESTIMONY ABOUT ACCOMPLISHED FACTS, WHICH PLACES A PREMIUM ON TESTIMONY ADVERSE TO A DEFENDANT, CREATES A RISK OF PERJURY SO GREAT THAT EVEN THE JURY'S FULL KNOWLEDGE OF THE AGREEMENT IS INSUFFICIENT TO PROTECT THE FUNDAMENTAL FAIRNESS INHERENT IN THE DUE PROCESS CLAUSE?

PARTIES BELOW

United States of America

Gay Spradley*

* Petitioner in this Court

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vs.
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

GAY SPRADLEY petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in this cause.

OPINION BELOW

The decision of the Court of Appeals (App. A, infra) is not officially reported as of this time.

JURISDICTION

On October 30, 1984, a panel decision was filed in the Eleventh Circuit, therein affirming the Petitioner's six convictions and sentences challenged on direct appeal. (App. A, Infra). On November 14, 1984, the Petitioner filed a timely Petition for Rehearing and Suggestion for En Banc Consideration. An order denying both rehearing and en banc consideration was thereafter filed by the Eleventh Circuit on November 29, 1984. (App. D, Infra). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and United States Supreme Court Rule 20.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Rule 43 of the Federal Rules of Criminal Procedure and the Due Process Clause of the United States Constitution.

STATEMENT OF THE CASE

On May 25, 1983, Reed and Koon were arrested in Florida in possession of a substantial amount of marijuana. (Vol. 8 at Pages 56-57). Soon after their arrest, they were indicted by a Federal Grand Jury in the Middle District of Florida for possession with intent to distribute over 1,000 pounds of marijuana and possession with intent to import. (Vol. 8 at Pages 57-58). The two-count indictment carried a maximum sentence of 20 years.

Reed and Koon got together afterwards and decided that they would ask for "some sort of deal" for their testimony. (Vol. 8 at Page 57). They finally sat down and entered into a plea agreement with counsel for the United States Government, who told them that if they were "willing to cooperate and tell [them] everything [they] know," they would receive leniency. (Vol. 8 at Pages 58-59). In their plea agreements executed on October 3, 1983, they entered a plea of guilty to one count of the indictment, and the second count would be dismissed. (Vol. 8 at Pages 149-150). The prosecutor was to make a recommendation at their future sentencing hearing that they receive no more than seven years of incarceration, or as little as "straight probation." (Vol. 8 at Pages 59-60, 149-150).

With respect to their plea agreements, Reed and Koon were required to describe in detail their illegal activities prior to the May 1983 transport of marijuana and resulting arrest. (Vol. 8 at Pages 61, 126). However, as part of Reed's plea bargain, Reed told the Government, "I will not do anything if I have to testify against my family or my good friend, Larry Jacobs." (Vol. 8 at

Page 63). Reed mentioned that Jacobs had been involved with him in the illegal drug business, (Vol. 8 at Page 64), but Reed didn't want to testify against Jacobs since Jacobs owned half of Reed's seafood business. (Vol. 8 at Page 87). Likewise, Koon would not go along with the plea agreement if he had to testify against anyone in his family or his friend, Jacobs. (Vol. 8 at Pages 154-155). Jacobs admitted that he was also involved in the May 1983 venture with Reed and Koon, but no charges were brought thereon against Jacobs as part of a plea arrangement. (Vol. 8 at Pages 201, 206).

Reed, Koon and Jacobs thereafter testified before the grand jury that they were involved in a number of prior importation ventures into Florida. Specifically, they described to the grand jury two marijuana importation ventures in 1981 and 1982, both purportedly involving the Petitioner, her ex-husband Joseph Spradley, and two other persons named King and Morris. (Vol. 8 at Pages 26-32).

On December 15, 1983, a six-count indictment was returned in Jacksonville, Florida, against the Petitioner, her ex-husband, King and Morris, charging them with conspiracy to import and possess marijuana, and importation and possession of marijuana. (App. B, Infra). King, Morris and the Petitioner subsequently entered pleas of "not guilty." At the time of trial, Joseph Spradley had not been apprehended.

Several months later, on February 17, 1984, after reaching plea agreements with the Government, King and Morris entered pleas of guilty to only the first count of the indictment. (R 332-334). They were required to testify against the Petitioner. As part of King's and Morris' plea agreements, they were to receive a sentence of no more than five years, or as little as straight probation. (Vol. 7 at Page 11).

A few days later, on February 21st, the Petitioner proceeded alone to trial in the Middle District of Florida before United States District Judge John H. Moore, II. That same day the Government filed a modified sentencing recommendation for

Koon, further reducing Koon's maximum penal liability from seven years to five, with the possibility of straight probation. (Vol. 8 at page 149-150).

At the Petitioner's brief two-day trial, there was no physical or tangible evidence presented by the Government to prove that the two 1981 and 1982 ventures had taken place, or that the Petitioner was involved. The only evidence offered by the Government against the Petitioner was the oral testimony of Reed, Koon, Jacobs, King and Morris.

Reed testified at trial that in October, 1981, he and other "investors" such as Koon, Jacobs and Joseph Spradley had purchased an airplane and bought marijuana. (Vol. 8 at Page 26). Later that month, the Petitioner assisted them in picking out landing sites in central Florida. (Vol. 8 at Pages 29-30). Before Thanksgiving in November, 1981, the Petitioner, Reed, Koon and Jacobs served as "look outs" for a load of marijuana that had then arrived in Columbia County, Florida. (Vol. 8 at Page 37). King and Morris transported the marijuana with their truck. (Vol. Page 34). However, Morris testified that the load came in somewhere "approximately a week *after* Thanksgiving." (Vol. 9 at Page 23). Approximately five to seven hundred pounds of marijuana was there. (Vol. 8 at Page 39).

According to Reed, a second load transported 700 pounds of marijuana in February, 1982, involving essentially the same people except for a new airplane refueler. (Vol. 8 at Pages 43-46). Morris believed the second load took place "sometime in January." (Vol. 9 at Page 31). The preparation and distribution of the second marijuana load worked essentially the same as the first. (Vol. 8 at Page 44, 197).

Reed testified that after the second load, the group thought of doing another. (Vol. 8 at Page 47). However, Joseph Spradley informed Reed that the pilot would not agree to do a third load, (Vol. 8 at Page 47): his nerves were gone. (Vol. 8 at Page 76). However, Reed and Koon wanted to buy the plane alone to continue the illegal importation of marijuana into

Florida, since Koon had just received his pilot's license. (Vol. 8 at Page 76). Although Reed and Koon never paid Joe Spradley for the plane, they got possession and changed the title of it. (Vol. 8 at Page 77).

Reed testified further that he and Koon subsequently decided to import marijuana by water on the trimaran sailboat rather than by air. (Vol. 8 at Page 77-78). It was this trip (in May 1983) that resulted in their being caught with over 1,000 pounds of marijuana. (Vol. 8 at Page 78). Reed stated that Joe Spradley had nothing to do with this venture. (Vol. 8 at Page 78).

Koon testified on direct examination that the second load of marijuana "worked pretty much the same" as the first, other than a new refueler being involved. (Vol. 8 at Page 139). However, subseuquently during his cross-examination, Koon testified that the airplane used on the second trip was a different one than used on the first. (Vol. 8 at Page 157). According to Koon, they were supposed to do a "third load," but they didn't want to since the pilot would not fly another trip. (Vol. 8 at Pages 140-141).

Koon had testified that after the second deal he had obtained possession of the airplane, and put it in the name of "Michael Stalzer". (Vol. 8 at Pages 142-143). Joseph Spradley was agreeable to this, but he was never paid for the plane since Koon had found out that "they did a third load with it." (Vol. 8 at Page 143). Koon testified that he "didn't have anything to do with" the third load. (Vol. 8 at Page 143).

However, on cross-examination, Koon stated that he *was* involved with the Petitioner and her former husband in "another" airplane load. (Vol. 8 at Pages 156-157). Koon then testified that there were *three* trips done, using two different airplanes. (Vol. 8 at Pages 157-158). When asked if he did anything else with Joe Spradley after the second trip ended, Koon answered, "we did another airplane load, three airplane loads." (Vol. 8 at Page 160). After the third trip, Koon was not fully paid by Joe Spradley, and Koon didn't know if Joe Spradley would pay him in the future. (Vol. 8 at Page 160).

The Government and the Petitioner concluded their cases after only a day and a half of trial, and the jury set out to deliberate. (App. C, Infra). Following two hours and ten minutes of deliberations by the jury, Judge Moore summoned the attorneys and announced as follows:

> THE COURT: We apparently have, at this stage, at least, a hung jury. I received the following communication from the jury: "Judge Moore, the jury apparently will *never* be able to reach a unanimity on any of the charges in this case. The issue causing the problem is *credibility of the witnesses.*" Signed by the foreman. (Emphasis added.) (A 9, infra).

The prosecutor then suggested that Judge Moore "make some inquiry of the foreman as to whether the jury believes additional time will help. It may be that they're so split that there's no use in it..." Judge Moore responded, "I know what that answer would be to that; I can tell from the note." Petitioner's counsel reminded the court of a similar "hung jury" three weeks earlier involving certain of these same government witnesses, and requested that a mistrial be granted. Judge Moore denied the requested mistrial, and gave the jury the standard "Modified *Allen* charge" in accordance with the Fifth Circuit Pattern Jury instructions. The jury then returned to deliberate further. (A 9-11, infra).

Almost an hour and a half after receiving the *Allen* charge, the Marshal announced that the jury had a verdict. Just prior to publishing the jury's verdict, Judge Moore informed counsel:

> "THE COURT: All right. During the interim we had a note from the jury since the last one. It — at approximately 6:00 o'clock, where they ask me, "May we have testimony read to us regarding the second plane load of marijuana, specifically what was the testimony concerning Gay Spradley's involvement at the landing site, at the stash house and thereafter." Signed by the foreman. I responded in writing to that by saying that we have no transcripts available of the testimony and you will have to follow your own recollection, period. That was all I said." (A 12, infra).

The Clerk then published the jury's verdict finding the Petitioner "guilty" on all six counts of the Indictment. (A 13-14, infra).

At the subsequent sentencing, it was noted that the Petitioner was a licensed nurse with no prior criminal history other than a driving offense. She received concurrent five-year terms of imprisonment on counts one through five of the indictment, followed by a three-year special parole term and a four-year probation term. (Vol. 10 at Page 22). Judge Moore also imposed a $2,500 fine.

On March 28, 1984, the Petitioner filed a timely notice of appeal and a motion for bail pending appeal. (R 425-431). This motion was granted by Judge Moore, and the Petitioner was ordered released pending appeal on a $30,000 cash or surety bond. (R 441-443).

In her direct appeal, the Petitioner argued (1) that the district judge's modified *Allen* charge was overly coercive; (2) that the district judge erred in denying her request for a mistrial after the jury announced it "will never be able to reach a unanimity on any of the charges [due to] credibility of the witnesses"; (3) that the district judge erred in not disclosing to her or her counsel a second note from the jury requesting that specific testimony be read to them; and, (4) that it was a fundamental denial of due process for the Government to procure her conviction based exclusively on the testimony of five informants who have a stake in offering incriminating testimony against her.

On October 30, 1984, the Eleventh Circuit filed a decision affirming the Petitioner's convictions and sentences, without oral argument (App. A, Infra).

REASONS FOR GRANTING THE WRIT

I

IT IS A VIOLATION OF FED.R.CRIM.PRO. 43 AND A DENIAL OF DUE PROCESS FOR A TRIAL JUDGE TO FAIL TO DISCLOSE TO A DEFENDANT A WRITTEN COMMUNICATION FROM THE JURY REQUESTING THAT SPECIFIC DESIGNATED TESTIMONY BE READ TO THEM, AND DENYING THE REQUEST *SUA SPONTE* WITHOUT NOTICE TO THE DEFENDANT, AFTER A JURY HAD ANNOUNCED EARLIER THAT THEY WERE FIRMLY DEADLOCKED DUE TO CREDIBILITY PROBLEMS OF THE PROSECUTION WITNESSES AND HAD BEEN CHARGED WITH AN *ALLEN* INSTRUCTION.

The Petitioner had argued on appeal that Judge Moore's failure to disclose the jury's second written communication to her or her counsel, and the court's *sua sponte* denial without notice to her, violated Rule 43 of the Federal Rules of Criminal Procedure and the due process clause of the United States Constitution.

The first communication was received after a couple of hours of deliberation:

> "Judge Moore, the jury apparently will *never* be able to reach a unanimity on any of the charges in this case. The issue causing the problem is *credibility of the witnesses.*" Signed by the foreman. (A 9, infra).

The trial judge responded to this deadlock with a modified *Allen* charge, over the Petitioner's request for a mistrial. (A 10).

The second note from the jury had later requested...

> "May we have testimony read to us regarding the second plane load of marijuana, specifically what was the testimony concerning Gay Spradley's involvement at the landing site, at the stash house and thereafter." Signed by the foreman.

Judge Moore responded *sua sponte* in writing that "we have no transcripts available of the testimony and you will have to follow your own recollection." (A 12, infra). It wasn't until 40 minutes later, *after* the jury had reached its verdict finding the Petitioner guilty, that she and her counsel were advised of the jury's earlier request to have specific testimony read. (A 12, infra).

While the panel decision facially appears to strongly disapprove of the trial judge's actions in withholding the communication and not allowing the Petitioner any opportunity to make suggestions, requests, and objections, the panel decision nonetheless finds "no reversible error" under the facts of this case, citing the Eleventh Circuit's opinion in *United States v. Ziellie,* 734 F.2d 1447, 1460 (11th Cir., 1984), which affirmed a similar procedural error on Judge Moore's part. Under the unique circumstances of this case "in the totality," the panel decision is repugnant to the Supreme Court's enunciation in *Rogers v. United States,* 422 U.S. 35,39, 45 L.Ed.2d 1,6, 95 S.Ct. 2091 (1975) and other circuit court decisions.

In *Rogers v. United States,* 422 U.S. at 39, this Court emphasized that a trial judge *must* disclose any and all written communications from jurors during their deliberation, and failure to do so is ordinarily reversible error:

> "Federal Rule Crim. Pro. 43 guarantees to a defendant in a criminal trial the right to be present "at every stage of the trial including the impaneling of the jury and the return of the verdict." Cases interpreting the Rule make it clear, if our decisions prior to the promulgation of the Rule left any doubt, that the jury's message should have been answered in open court and that petitioner's counsel should have been given an opportunity to be heard before the trial judge responded."

While this Court noted that a trial judge's failure to disclose jury communications to a defendant and the trial court's response thereto "may in some circumstances be harmless error," 422 U.S. at 40, the *Rogers* decision suggests that non-disclosed jury communications "create a presumption of prejudice." See *United States v. Treatman,* 524 F.2d 320, 323 (8th Cir., 1975).

The district judge's procedural error in this cause is compounded; not only was there a failure to disclose the jury's second communication, but a summary deprivation of the defendant's right to have specific testimony re-read. The Eleventh Circuit's resolution of the compounded problems in this cause and in *Zielie* conflict with the import of *Rogers* and other circuit court decisions, which would appear to treat Judge Moore's repeated procedural nonfeasance as reversible and harmful error. See: *United States v. Ronder,* 639 F.2d 934 (2nd Cir., 1981) (where a jury sends a request in a note to a judge following an *Allen* charge, and the contents of that note is not disclosed to defense counsel, a reversal for a new trial is warranted unless the reviewing court can say "with fair assurances" that the judges procedural error in handling the jury's inquiry did not affect the verdict); *United States v. Treatman,* 524 F.2d 320,323 (8th Cir., 1975) (communications between judge and jury in the absence of and without notice to defendant and his counsel are improper, and "create a presumption of prejudice")' *United States v. Zarintash,* 736 F.2d 66, 70-71 (3rd Cir., 1984) (where a district judge refuses a jury's request to read back specific testimony in a drug case, which "severely impeached" other testimony, it is reversible error for a new trial); *United States v. Rabb,* 453 F.2d 1012, 1014 (3rd Cir., 1971) (where government's only evidence linking defendant to crime was the testimony of three witnesses, specific testimony which the jury asked to have read to them was absolutely crucial to their determination of the defendant's guilt or innocence; testimony would have taken less than an hour to read).

The Third Circuit recently pointed out in *Zarintash* that a trial court has broad discretion in deciding whether to accede to a jury's request for a reading of testimony. 736 F.2d at 69-70. However, the court reversed Zarintash's conviction, announcing well-articulated guidelines:

> "But this discretion is based upon a limited, twofold rationale: first, that requests to read testimony may slow the trial where the requested testimony is lengthy; second, that reading only a portion of the testimony may cause the jury to give that portion undue emphasis. [Citation omit-

> ted]. Thus,...a trial judge abuses his discretion where the refusal to read requested testimony is not supported by one of these reasons." 736 F.2d at 70.

Judge Moore's ruling herein fails to be even arguably supported by either the first or second rationale as announced above.

If the district judge had followed the required procedure, defense counsel and/or the prosecutor could have easily used their notes to identify and designate by agreement the appropriate brief portions of the testimony requested by the jury for re-reading. Since the unusually short trial consisted in total of only about one day of testimony, it would have been a minimal amount of effort for the court reporter to read maybe an hour or so of testimony pertinent to the items requested by the jury. Or perhaps other suggestions may have been made by counsel. Revisiting this requested testimony would have caused the jurors to attempt to reconcile the significant inconsistencies in the testimony of the five informants and fairly determine the Petitioner's innocence of guilt.

The panel decision in this cause essentially sets forth a rule in the Eleventh Circuit that wholly destroys a criminal defendant's right to be either privy to jury communications and/or to have specific testimony read back by the court reporter, even in highly prejudicial circumstances as here where inconsistencies in informants' testimony would be recognized by revisiting that testimony. Moreover, the panel may have taken undue liberties in supposing that "most trial judges follow the procedure used here." Even the *Zielie* rationale is inapplicable to this cause, since the jurors here did *not* request "a copy of the transcript." The panel in *Zielie,* in finding as harmless error Judge Moore's failure to communicate the jury's request for "a copy of the transcript" and his *sua sponte* response to the jury that no transcript had been prepared, had relied narrowly and exclusively on the fact that "the judge's answer to the jury's inquiry is distinctly responsive to the question." 734 F.2d at 1460. In the case *sub judice,* Judge Moore's reply to the jury "that we have no transcripts available" was wholly non-responsive to their request to "have testimony *read* to us," since that is *not* what the

jury had requested. Thus, *Zielie's* rationale was improperly applied to the facts of this case, and tenuously extended to condone virtually all procedural errors of this sort.

In considering this issue, this Court must keep in mind that the jury had announced a firm deadlock due to the "problems" of the witnesses' credibility and was given an *Allen* charge, long recognized as standing "at the brink of impermissible coercion." *United States v. Seawell,* 550 F.2d 1159, 1163 (9th Circ., 1977). And the Government's whole case *was* nothing other than the credibility of these five informants, since there was not one single item of tangible or physical evidence supporting the indictment against the Petitioner. It is obvious by the foreman's deadlock note that a portion of the jury had found the Petitioner to be innocent, and the jury was at least attempting to comply with the *Allen* instruction's message and break their deadlock by intelligently revisiting the specific excerpts of testimony pertinent to Petitioner's alleged role. They were precluded from reconciling the inconsistencies in testimony by the district judge's nonfeasance.

For example, the indictment charged the Petitioner with importing the second load of marijuana "in or about February and March 1982, at Fort White, Florida." However, Morris testified that the second load took place "sometime in January." (Vol. 9 at Page 31). Reed said it occurred in February. (Vol. 8 at Page 43). Reed also indicated that the *same* airplane, bought jointly by the group including the Petitioner and her ex-husband, was used in both the first and second trips *without* another load being done by the group. (Vol. 8 at Pages 46-47, 44). Koon somewhat confusingly stated that he *was* involved with the Petitioner and her then husband in another *third* trip, and that the airplane used on the second trip was *different* than the one used on the first. (Vol. 8 at Pages 156-158, 160). And on Koon's earlier direct examination, Koon testified that he "found out later that they did a third load" with the group's jointly owned airplane, but that he (Koon) "didn't have anything to do with [the third load]." (Vol. 8 at Page 143). Moreover, Morris testified regarding the second load that he had unloaded the

marijuana into the house in Gainesville with Jacobs, the Petitioner, and a "guy named Sam." (Vol. 9 at Page 27). Not one of the other government witnesses ever mentioned a "Sam" participating in the unloading of the second load or being present at the "stash house." (See Vol. 8 at Pages 44, 198). These and numerous other inconsistencies are obvious.

The Government had maintained in the Eleventh Circuit that Judge Moore's procedural error concerning the jury's request for the reading of testimony was "harmless,":

> "the testimony would not be *significantly* favorable to the defendant. Whatever minor inconsistencies it might have shown are insignificant compared to the fact that all [five of] the witnesses incriminated defendant." [Appellee's brief, page 17]. (Emphasis added).

However, the Government's "strength in numbers" position is untenable, in light of the jury's "problem" with the "credibility of the witnesses," and the fact that there was absolutely no tangible evidence corroborating their testimony motivated by self-interest.

Not only did Reed and the three other witnesses tend to impeach Koon's and each others' testimony, but Koon's testimony severely impeached itself as to the "second load." These inconsistencies and contradictions are crucial, especially within Koon's own testimony, since they tend to suggest that these witnesses were untruthful or coloring their testimony in order to procure even more lenient sentencing recommendations at their forthcoming sentencing hearings from the prosecutor. The Petitioner was harshly prejudiced by being summarily deprived of a meaningful opportunity for the jury to intelligently evaluate the credibility of the five witnesses and only evidence against her, in order to attempt to have the jury's deadlock resolved fairly or in her favor.

II

AN AGREEMENT TO PROCURE TESTIMONY ABOUT ACCOMPLISHED FACTS, WHICH PLACES A PREMIUM ON TESTIMONY ADVERSE TO A DEFENDANT, CREATES A RISK OF PERJURY SO GREAT THAT EVEN THE JURY'S FULL KNOWLEDGE OF THE AGREEMENT IS INSUFFICIENT TO PROTECT THE FUNDAMENTAL FAIRNESS INHERENT IN THE DUE PROCESS CLAUSE.

"[A]n agreement granting government favors to a prosecution witness in return for truthful testimony about others is not *per se* illegal." *United States v. Waterman,* 732 F.2d 1527, 1531 (8th Cir., 1984). However, the federal courts are charged with "supervisory powers" to ensure the fair conduct of trials mandated by the due process clause concerning the fairness of agreements to reward those who testify for the government contingent upon the content and results of their testimony. 732 F.2d at 1531.

In her direct appeal, the Petitioner also argued that it was a fundamental denial of due process for the Government to procure her convictions based exclusively on the testimony of five witnesses uncorroborated by a single item of tangible evidence, when these witnesses were offered lenient treatment and/or immunity for themselves, families and friends, contingent upon their "truthful testimony" against her, under such circumstances which gave the five witnesses an overall stake in rendering incriminating testimony against her in order to "please" the Government for further recommendations of leniency. The panel decision in this cause, noting that the *Waterman* opinion was on rehearing *en banc,* held on this point:

> "Without commenting on this opinion, we find no factual support in the record for the argument being made." (A 3).

On May 2, 1984, the United States Court of Appeal for the Eighth Circuit in *Waterman* considered the novel issue of...

> "whether an agreement to procure testimony about accomplished facts, which places a premium on testimony adverse to a defendant, creates a risk of perjury so great that even the jury's full knowledge of the agreement is insufficient to protect the fundamental fairness inherent in the due process clause." 732 F.2d at 1530.

After a full analysis of the issue, the court stressed the basic danger and inherent unconstitutionality of any agreement for lenient treatment between a government witness and a prosecutor that is contingent upon the witness's "cooperation by way of truthful testimony in any ... further trials," under circumstances that may give the government witness a stake in the incrimination of others. 732 F.2d at 1531. The Eighth Circuit had declared such agreements to constitute the government's "invitation to perjury," and it is a denial of due process to position the jury "to weed out the seeds of untruth planted by the government." 732 F.2d at 1531-1532. The Government's agreements *sub judice* with Reed, Koon, Jacobs, King and Morris to testify against the Petitioner before the federal grand jury and/or at trial were under such circumstances so as to fundamentally deprive the Petitioner of due process of law.

The Government's five witnesses against the Petitioner at trial, and their families and friends, were all facing an overwhelming assortment of criminal charges. By offering incriminating testimony which implicated the Petitioner in two (or perhaps three) marijuana ventures, these five witnesses were all able to minimize their penal liability to as little as a term of probation, and immunize their drug offending family members and friends from prosecution.

It was Koon's understanding at trial that in order for him to get any lesser period of incarceration than seven years, the Government would have to "bring to the Court's attention" all of his cooperation and testimony that he had provided. (Vol. 8 at Page 151). On that very first day of the Petitioner's trial on February 21, 1984, Koon had coincidentally earned himself further lenient treatment, since the Government filed a new Sentencing Memorandum recommending that Koon's maximum penal

liability be reduced even further to five years. Government counsel informed the that court in the recommendation that "law enforcement personnel are extremely pleased" with Koon's assistance. (Vol. 8 at Pages 149-150). It is also most noteworthy that all five of the witnesses' sentencing hearings were put off until *after* the Petitioner's trial, notwithstanding the fact that Reed, Koon and Jacobs had entered their pleas almost six months earlier on October 3, 1983.

The Eighth Circuit in *Waterman,* 732 F.2d at 1531-1532, declared plea agreements unconstitutional which may give a witness a stake in incriminating others:

> "We agree with Waterman that the government cannot consistent with due process offer favorable treatment to a prosecution witness contingent upon the success of the prosecution. Such an agreement is nothing more than an *invitation to perjury* having no place in our constitutional system of justice. The Government attempts to avoid this commonsense approach to due process in the instant case by distinguishing the agreement made with Gamst and emphasizing the jury's ability to decide upon the credibility of witnesses. It also declares that Waterman was not prejudiced by the agreement with Gamst. We cannot agree as a matter of law or fact.
>
> * * *
>
> More fundamentally, however, we see no place in due process law for positioning the jury to weed out the seeds of untruth planted by the government. Certainly Gamst might have lied regardless of the contingency agreement and the jury was generally commissioned to determine the truth of his testimony; but that is no reason for the government to give him further incentive to selectively remember past events in a manner favorable to the indictment or conviction of others." (Emphasis added).

Accordingly, the panel ordered Waterman's conviction to be vacated for discharge, holding...

> "in sum, we are convinced that due process cannot be interpreted to allow the government to reward its witnesses

> based upon the results of their testimony. There simply is no reason to offer a witness favorable treatment for anything other than truthful cooperation in the government's quest for justice." 732 F.2d at 1533.

See also: *Williamson v. United States,* 311 F.2d 441 (5th Cir., 1963).

Thus, the substance of the five witnesses' agreements with the government was such that they subjectively believed they had to be successful in convincing the grand jury and/or the jury at trial that the Petitioner was involved in these alleged 1981 and 1982 marijuana importation ventures. Koon's success in earning an even more favorable sentencing recommendation on the first day of the Petitioner's trial made it evident to all five witnesses that "rewards" for more lenient treatment might be forthcoming at or before their subsequent sentencing hearings if they would please the Government appropriately. There is a substantial factual basis showing that further recommendations for lenient treatment were contingent on the Government's success with the Petitioner's indictment and prosecution.

The *Waterman* decision is a long overdue realization by a federal appeals court of the ethical, legal and constitutional problems stemming from the marked increase in the government's use of informants in criminal cases. Informing raises questions about the basic fairness of our criminal justice system. Should the role of the government and courts be to encourage informing? Is it likely that an individual, threatened with years of prison, will lie to the court and jury in order to tell the government what it wants to hear? Is compelling an individual with irresistible pressures to "turn" as an informant consistent with the traditional premises of our legal system? It is these very concerns that caused Eighth Circuit Chief Judge Donald P. Lay and the other judges to subscribe to the decision in *Waterman.*

Even the observations of the Chief of the United States Justice Department's Criminal Division, Stephen S. Trott, suggest that the testimony of criminal informants are inherently unreliable. Trott states in a Justice Department publication to prosecutors:

"The first of the two reasons relates to the general nature of a person/witness predisposed to criminality. Read it and commit the message to memory:

(1) Criminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law. In my personal firsthand experience of over eighteen years as a prosecutor, this willingness to do anything includes not only truthfully spilling the beans on friends and relatives, but also lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and double-crossing anyone with whom they came into contact, including — and especially — the prosecutor. A drug addict can sell out his mother to get a deal; and burglars, robbers, murderers and thieves are not far behind. They are remarkably manipulative and skillfully devious. Many are outright conscienceless sociopaths to whom 'truth' is a wholly meaningless concept. To some, 'conning' people is a way of life. Others are just basically unstable people. A 'reliable informant' one day may turn into a consummate prevaricator the next."

—Trott, *The Successful Use of Snitches, Informants, Coconspirators, and Accomplices as Witnesses for the Prosecution in a Criminal Case,* Page 2 (Att'y Gen. Publication, Jan. 1984 Revision).

Likewise, after the defense acquittal in *United States v. DeLorean,* Case No. CR 82-910 RMT, (C.D.Cal., filed 1982), legal scholars had expressed condemnation of the excessive reliance on informants: "The lesson is that too much use is made of dope smugglers and addicts facing prison who have a tremendous temptation to frame somebody," says University of Michigan law Professor, Yale Kamisar. NEWSWEEK, August 27, 1984, at 23. Thus, there is certainly some consensus that exclusive reliance on such informant testimony to procure convictions deteriorates the quality of our criminal justice system.

In sum, the Government's agreements with the five prosecution witnesses in this case contained such irresistible compulsions to incriminate the Petitioner that it fundamentally denied the Petitioner of due process of law. This Court should take cognizance of the *Waterman* decision in accordance with the fundamental fairness mandated by the due process clause, and vacate the Petitioner's convictions.

CONCLUSION

The Eleventh Circuit has developed a rule which wholly destroys not only an accused's ability to have specific witness testimony read back to a jury during its deliberations, but firmly denies a defendant the right to even be privy to communications between a jury and trial judge which concern a jury's request that designated testimony be read. These sort of procedural errors in combination cannot be deemed harmless in a case such as this which is devoid of any physical or tangible evidence of a defendant's guilt, and the only proof of guilt is exclusively from the inconsistent testimony of alleged co-perpetrators who are motivated to please a prosecutor and color testimony in order to be "rewarded" with further Government recommendations for more lenient treatment. Accentuating the prejudice in this cause is the fact that the jury had announced a firm deadlock due to "problems" of these witnesses' credibility, was then charged with an *Allen* instruction over the Petitioner's request for a mistrial, and the jury later sought to revisit specific testimony in order intelligently resolve their indecision with fairness to the accused. Notwithstanding, it is a fundamental denial of due process for the Government to procure a criminal conviction based exclusively on the testimony of alleged "co-conspirators" who have an apparent stake in rendering incriminating testimony against an accused. A Writ of Certiorari should issue for the purpose of establishing these principles of fairness and due process.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 84-3220
*Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GAY SPRADLEY,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(October 30, 1984)

Before RONEY, FAY and JOHNSON, Circuit Judges.

PER CURIAM:

Appellant was convicted of numerous charges relating to conspiracy to import and possess marijuana and the importation and possession of marijuana. On appeal she raises four issues:

(1) The giving of a modified "Allen" charge,

(2) The denial of a mistrial after the jury announced it was deadlocked,

(3) Failure to disclose to counsel a communication between the judge and jury during deliberations of the jury, and

(4) The improper use by the government of five witnesses alleged to have been involved in a variety of illegal activities with appellant and her husband (now fugitive ex-husband).

Following some two hours of deliberation, after a short trial, the jury sent a note to the trial judge indicating that they "will never be able to reach a unanimity." After conferring with counsel, the court read to the jury a modified "Allen" charge taken from the Pattern Jury Instructions published by the District Judges Association. Defense counsel asked for a mistrial. We find no abuse of discretion in the denial of the mistrial. We, likewise, find no error in the use of this modified "Allen" charge. United States v. Holman, 680 F.2d 1340 (11th Cir. 1982).

About one hour after the giving of the supplemental charge, the jury sent a second note to the trial judge. In this note the jury requested certain testimony be read to them concerning "the second plane load of marijuana, specifically what was the testimony concerning Gay Spradley's involvement at the landing site, at the stash house and thereafter." In response, the judge wrote a note advising the jury that no transcripts were available and that they must rely upon their own recollection. This was done without advising counsel. As we discussed in United States v. Ziele, [734 F.2d 1447 (11th Cir., 1984)], trial judges should always confer with counsel concerning communications with a jury during deliberations. Counsel should be made aware of any and all notes from the jury, should be given an opportunity to make suggestions, requests and objections and should be advised of the court's intended action prior to its implementation. However, failure to follow such procedures is not an automatic *per se* ground for reversal. This type of request is fairly routine. Trial judges usually have a standard approach to this type inquiry. Some attempt to read testimony while others use expedited transcripts. Most trial judges follow the procedure used here and advise the jury to rely upon its own recollection of the testimony. This is particularly true in instances where the trial has been of short duration. We again urge and instruct all trial judges to confer with counsel on these matters. Under the facts of this case, we find no reversible error.

By way of supplemental brief the appellant urges that the government has violated her due process rights to fundamental fairness by using the testimony of five witnesses who had entered into plea agreements. The argument presented is based upon *United States v. Waterman,* 732 F.2d 1527 (8th Cir. 1984), which is now pending before the *en banc* court in the Eighth Circuit. The panel opinion relied upon condemns the use of a witness who has entered into an agreement with the government based upon the results of his or her testimony. Without commenting on this opinion, we find no factual support in the record for the argument being made.

The judgment and convictions are AFFIRMED.

APPENDIX "B"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA	No. 83-190-Cr.-J-16 Ct. 1 - 21 USC 952(a), 960 & 963
v.	(5yrs/$15,000/both) Ct. 2 - 21 USC 841(a)(1), 846
JOSEPH M. SPRADLEY, GAY SPRADLEY, JOHNNY KING, and HOLMES MORRIS	(5yrs/$15,000/both) Cts. 3, 5 - 21 USC 952(a), 960 (5yrs/$15,000/both/special parole) Cts. 4, 6 - 21 USC 841(a)(1) (5yrs/$125,000/both/special parole)

INDICTMENT

The Grand Jury charges:

COUNT ONE

From on or about October 1, 1981, and continuously thereafter, up to and including April 30, 1982, in Columbia County, in the Middle Judicial District of Florida, and elsewhere,

JOSEPH M. SPRADLEY,
GAY SPRADLEY,
JOHNNY KING, and
HOLMES MORRIS,

the defendants herein, did unlawfully, knowingly, willfully and intentionally combine, conspire, confederate and agree with each other and other persons to the grand jury known and unknown to unlawfully import into the United States from a place outside thereof, a quantity of marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Sections 952(a), 960 and 963.

COUNT TWO

From on or about October 1, 1981, and continuously thereafter, up to and including April 30, 1982, in Columbia County, in the Middle Judicial District of Florida, and elsewhere,

JOSEPH M. SPRADLEY,
GAY SPRADLEY,
JOHNNY KING, and
HOLMES MORRIS,

the defendants herein, did unlawfully, knowingly, willfully and intentionally combine, conspire, confederate and agree with each other and other persons to the grand jury known and unknown to unlawfully possess with intent to distribute marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

COUNT THREE

In or about November 1981, at Fort White, Florida, in the Middle Judicial District of Florida,

JOSEPH M. SPRADLEY,
GAY SPRADLEY,
JOHNNY KING, and
HOLMES MORRIS,

the defendants herein, did knowingly, intentionally and willfully import and cause to be imported into the United States from a place outside thereof, a quantity of marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Sections 952(a) and 960, and Title 18, United States Code, Section 2.

COUNT FOUR

In or about November 1981, at Fort White, Florida, in the Middle Judicial District of Florida,

JOSEPH M. SPRADLEY,
GAY SPRADLEY,
JOHNNY KING, and
HOLMES MORRIS,

the defendants herein, did knowingly, intentionally and willfully possess with intent to distribute and cause to be possessed with intent to distribute marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and Title 18, United States Code, Section 2.

COUNT FIVE

In or about February and March 1982, at Fort White, Florida, in the Middle Judicial District of Florida,

JOSEPH M. SPRADLEY,
GAY SPRADLEY,
JOHNNY KING, and
HOLMES MORRIS,

the defendants herein, did knowingly, intentionally and willfully import and cause to be imported into the United States from a place outside thereof, a quantity of marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Sections 952(a) and 960, and Title 18, United States Code, Section 2.

COUNT SIX

In or about February and March 1982, at Fort White, Florida, in the Middle Judicial District of Florida,

JOSEPH M. SPRADLEY,
GAY SPRADLEY,
JOHNNY KING, and
HOLMES MORRIS,

the defendants herein, did knowingly, intentionally and willfully possess with intent to distribute and cause to be possessed with intent to distribute marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and Title 18, United States Code, Section 2.

A TRUE BILL

_____

FOREMAN

ROBERT W. MERKLE
United States Attorney

By:_____
THOMAS E. MORRIS
Assistant United States Attorney

_____
CURTIS FALLGATTER, Managing
Assistant United States Attorney

APPENDIX "C"

THE COURT: Now, ladies and gentlemen, I'm going to allow you to take with you into the jury room a copy of the indictment in this case, together with this form of verdict for your convenience. And at this time I will ask Mrs. Ball, deputy marshal, to take the jury to the jury room to commence deliberating, and the clerk will muster all of the evidence which has been introduced and have that delivered to you in the jury room as well.

Miss Ball, will you take charge of the jury and maintain the security and the secrecy of the jury, please.

THE MARSHAL: Yes, sir. All rise, please.

MR. MORRIS [the prosecutor]: Your Honor, the two alternates.

THE COURT: Oh, I'm sorry. Mrs. Ferriol and Mrs. Holt, will you have a seat, please.

(Jury absent).

(Jury retired to commence deliberations at 2:55 p.m.).

THE COURT: Mrs. Ferriol and Mrs. Holt, you were the alternates and you will not have the opportunity to make the decision in this case. I hope this has been an interesting experience for you. I'm sure you are rather relieved of this responsibility and leaving it up to the other twelve, but I hope you have enjoyed your experience here and we sincerely thank you on behalf of everyone, and you may be excused at this time.

MR. GONZALEZ [Petitioner's counsel]: Your Honor, I'm sorry. I wonder if my client can be excused to go to the restroom?

THE COURT: We are now in recess until we hear from the jury.

MR. GONZALEZ: Thank you, your Honor.

(At 5:05 p.m., the following further proceedings commenced:)

THE MARSHAL: All rise. Court is now in session. Be seated, please.

THE COURT: We apparently have, at this stage, at least, a hung jury. I received the following communication from the jury: "Judge Moore, the jury apparently will never be able to reach a unanimity on any of the charges in this case. The issue causing the problem is credibility of the witnesses." Signed by the foreman.

The clerk will be directed to file and record that.

THE CLERK: Court's Exhibit number 1 for identification, your Honor.

THE COURT: Counsel care to be heard?

MR. GONZALEZ: Judge, I really don't know what to say, other than what does the Court normally do in — do you call it right now, is that what you do?

THE COURT: I call them in and give them the Allen charge, let them deliberate some more.

MR. MORRIS: Do you make an inquiry first, do they believe additional charges might help or anything, or —

THE COURT: No.

MR. GONZALEZ: Judge, what is the Allen charge? I haven't had it in so long, I haven't heard it in so long, if I might take a look at it. Thank you.

THE COURT: All right. Have you had an opportunity to go over it?

MR. GONZALEZ: Yes, I have, Judge.

THE COURT: Mr. Morris?

MR. MORRIS: There is some other language in Devitt and Blackmar that I — the Government prefers better than that, but I don't have it with me at this time. My suggestion or my recommendation, I guess, would be to make some inquiry of the foreman as to whether the jury even believes additional time will

help. It may be that they're so split that there's no use in it, but I'll leave it up to the Court's discretion, of course.

THE COURT: I know what the answer would be to that; I can tell from the note.

MR. GONZALEZ: Judge, would the — I don't know if this is timely, but would — this is the second time that Mr. Koon has been used as a witness in a federal case over the last three weeks. That jury likewise was hung. It was a federal case in front of Judge Paul, I think I made reference to it, and now we have a second one and I — you know, I'm — I know you can't tell the jury that, but certainly if there is a mistrial because of its — because it's hung, I would certainly ask that a mistrial be granted with prejudice against the Government. I mean, I'm going to —

THE COURT: You're right; you're premature.

MR. GONZALEZ: I appreciate it. I just want to let the Court know, you know, what I'm thinking about, hopefully.

THE COURT: I know what you're thinking about, but you can file such a motion in writing.

All right. Bring the jury in, please.

THE MARSHAL: Yes, sir.

All rise for the jury.

(Jury present).

THE MARSHAL: Be seated, please.

THE COURT: All right. Ladies and gentlemen, I understand that you are having difficulty reaching unanimity on the charges in this case. I am going to ask that you continue your deliberations in an effort to agree upon a verdict and dispose of this case, and I have a few additional comments I would like for you to consider as you do so.

This is an important case. The trial has been expensive and time, effort and money to both the defense and the prosecution. If you should fail to agree on a verdict, the case is left open and must be tried again. Obviously another trial would only serve to

increase the cost to both sides, and there is no reason to believe that the case can be tried again by either side better or more exhaustively than it has been tried before you. Any future jury must be selected in the same manner and from the same source as you were chosen, and there is no reason to believe that the case could ever be submitted to twelve men and women more conscientious, more impartial or more competent to decide it, or that more or clearer evidence could be produced.

If a substantial majority of your number are for a conviction, each dissenting juror ought to consider whether a doubt in his or her mind is a reasonable one since it appears to make no effective impression upon the minds of the others. On the other hand, if a majority or even a lesser number of you are for acquittal, the other jurors ought seriously to ask themselves again, and most thoughtfully, whether they do not have a reason to doubt the correctness of a judgment which is not shared by several of their fellow jurors, and whether they should distrust the weight and sufficiency of the evidence if it fails to convince several of their fellow jurors beyond a reasonable doubt.

Remember at all times that no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of the evidence. But remember also that, after full deliberation and consideration of the evidence in the case, it is your duty to agree upon a verdict, if you can do so, without surrendering your conscientious conviction.

You must also remember that if the evidence in the case fails to establish guilt beyond a reasonable doubt, the accused should have your unanimous verdict of not guilty. You may be as leisurely in your deliberations as the occasion may require, and should take all of the time which you may feel is necessary.

I will now ask that you retire once again and continue your deliberations with these additional comments in mind to be applied, of course, in conjunction with all of the instructions which I have previously given to you. Other than that I cannot help you.

You may retire. Miss Ball.

THE MARSHAL: All rise.

(Jury retired to commence further deliberations at 5:16 p.m.).

THE COURT: All right. We'll be in recess until we hear from the jury.

THE MARSHAL: All rise.

(Recess pending verdict of the jury).

(At approximately 6:40 p.m., the following further proceedings were held:)

THE MARSHAL: Everyone please rise. This Honorable Court is again in session. Be seated, please.

Your Honor, we have a verdict.

THE COURT: All right. During the interim we had a note from the jury since the last one. It — at approximately 6:00 o'clock, where they ask me, "May we have testimony read to us regarding the second plane load of marijuana, specifically what was the testimony concerning Gay Spradley's involvement at the landing site, at the stash house and thereafter." Signed by the foreman. I responded in writing to that by saying that we have no transcripts available of the testimony and you will have to follow your own recollection, period. That was all I said.

Mr. Courson — I asked him to save my answers so that we can file that in the file. File that as a Court Exhibit 2 and when the answer comes back we'll file that as Court Exhibit 3.

All right. The jury has indicated it's reached a verdict?

THE MARSHAL: Yes, sir.

THE COURT: All right. Bring the jury in, please.

THE MARSHAL: Yes, sir.

Everyone will please rise.

(Jury present).

THE MARSHAL: You may again be seated.

THE COURT: Ladies and gentlemen, have you reached a verdict?

THE FOREMAN: We have, your Honor.

THE COURT: Would you hand your verdict to the clerk along with that note, if you will.

All right. Mr. Courson, would you please publish the verdict of the jury.

THE CLERK: Yes, your Honor.

THE COURT: And ladies and gentlemen of the jury, please rise and harken to the publishing of your verdict.

THE CLERK: We, the jury, find the defendant, Gay Spradley, guilty as charged in count one of the indictment.

Guilty as charged in count two of the indictment.

Guilty as charged in count three of the indictment.

Guilty as charged in count four of the indictment.

Guilty as charged in count five of the indictment.

Guilty as charged in count six of the indictment.

So say we all. Donald L. Reynolds, foreman. Dated February 22nd, 1984.

Be seated, ladies and gentlemen.

THE COURT: Thank you.

Does counsel desire the jury to be polled?

MR. GONZALEZ: Please, your Honor.

THE COURT: All right, Mr. Courson, will you please poll the jurors.

THE CLERK: Yes, your Honor.

Carolyn Mulroe, is this your verdict?

JUROR: Yes, sir.

THE CLERK: Vilda Donovan, is this your verdict?

JUROR: Yes, sir.

THE CLERK: Deborah Hendrix, is this your verdict?

JUROR: Yes, sir.

THE CLERK: Michael Tallman, is this your verdict?

JUROR: Yes, it is.

THE CLERK: Christopher Dahm, is this your verdict?

JUROR: Yes, sir.

THE CLERK: Margaret Weeks, is this your verdict?

JUROR: Yes, it is.

THE CLERK: Robert Gass, is this your verdict?

JUROR: Yes, sir.

THE CLERK: Sabrina Mashburn, is this your verdict?

JUROR: Yes, it is.

THE CLERK: Doris Klipstine, is this your verdict?

JUROR: Yes, sir.

THE CLERK: Charles Bevan, is this your verdict?

JUROR: Yes, sir.

THE CLERK: Donald Reynolds, is this your verdict?

JUROR: It is.

THE CLERK: Buddy Padgett, is this your verdict?

JUROR: It is.

THE CLERK: Your Honor, I believe that completes the polling of the jury.

THE COURT: All right. Thank you.

Mr. Fisher, would you have the jury please wait in the jury room, and crack that other outside door open and I'll be in shortly.

THE MARSHAL: All right, sir.

Everyone please rise.

(Jury absent).

APPENDIX "D"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 84-3220

FILED U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
November 29, 1984
SPENCER D. MERCER
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GAY SPRADLEY,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC
(Opinion October 30, 1984, 11 Cir., 198____, _____F.2d_____).
(November 29, 1984)

Before RONEY, FAY and JOHNSON, Circuit Judges.

PER CURIAM:

(XXX) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Peter Fay
United States Circuit Judge

REHG-6

Office - Supreme Court, U.S.
FILED
APR 23 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1210

In the Supreme Court of the United States

OCTOBER TERM, 1984

GAY SPRADLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

1. Whether the failure of the district court to inform counsel of a communication between the judge and jury during deliberation of the jury constituted reversible error.

2. Whether the use of testimony of five co-conspirators who had entered into plea agreements with the government deprived petitioner of due process of law.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1210

GAY SPRADLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The decision of the court of appeals (Pet. App. A1-A3) is reported at 747 F.2d 1466 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1984. A petition for rehearing was denied on November 29, 1984 (Pet. App. A16-A17). The petition for a writ of certiorari was filed on January 28, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of one count of conspiring to import marijuana, in violation of 21 U.S.C. 952(a), 960, and 963, two counts of importing marijuana, in violation of 21 U.S.C. 952(a) and 960 and 18

U.S.C. 2, one count of conspiring to possess marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846, and two counts of possessing marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. She was sentenced to concurrent five-year terms of imprisonment on five counts, to be followed by a special parole term of three years, and to four years' probation on the remaining count, to commence following her release from confinement. Petitioner was also fined $5,000. The court of appeals affirmed (Pet. App. A1-A3).

1. The evidence at trial established that petitioner, together with six other persons, imported and distributed marijuana on two occasions during 1981 and 1982.[1] The first marijuana importation, of between 500 and 700 pounds, occurred in November 1981 and involved the use of an airplane recently purchased by certain of the co-conspirators. Petitioner's co-conspirators testified that petitioner aided in the enterprise by selecting landing sites and later serving as a lookout when the marijuana arrived (Pet. 4; see, *e.g.*, VIII R. 29-30, 37). She performed similar functions in connection with the second importation, which occurred in February 1982 and again consisted of approximately 700 pounds (Pet. 4-5; see VIII R. 43-46).[2]

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[1]Petitioner was named in a six count indictment together with John King, Benjamin Holmes Morris, and her former husband Joseph Spradley (Pet. App. A4-A7). At the time of petitioner's trial, Joseph Spradley remained at large. William Reed and Monte Koon, arrested some months before petitioner while attempting to import marijuana in a sailboat, later disclosed their involvement in the transactions in which petitioner was involved. Larry Jacobs, the seventh member of the conspiracy, waived indictment and pled guilty to an information before petitioner went to trial (VIII R. 200).

[2]While all five co-conspirators who testified at petitioner's trial agreed that she had participated in both importation schemes, Morris recalled that the first marijuana shipment arrived approximately one week later than the other witnesses testified that it arrived. Similarly, he recalled

The government's case at trial depended largely on the testimony of five of petitioner's six confederates, each of whom entered into plea agreements under which they would plead guilty to a single count and testify truthfully at petitioner's trial. The government, in turn, agreed to recommend certain maximum sentences with respect to each individual. King and Morris both pleaded guilty to one count of conspiracy to import marijuana (II R. 332-333), carrying a maximum penalty of five years' imprisonment. King also pleaded guilty to a charge in a separate prosecution in a different judicial district, carrying a 15 year maximum term of imprisonment (VIII R. 100-102, 105). Jacobs pleaded guilty to a single count of conspiracy to import, and the government agreed to recommend that he be sentenced to no more than three years' imprisonment (*id.* at 200). Reed and Koon pleaded guilty to single counts of possession and the government initially agreed to recommend seven year sentences (*id.* at 59-60, 149-150). After Koon assisted the government in an unrelated investigation as a confidential informant, however, the government agreed to reduce its recommendation as to him alone to no more than five years' imprisonment (*id.* at 125-126, 149, 152; IX R. 7). While requiring each individual to offer exclusively "truthful testimony" at petitioner's trial, none of the plea agreements contained any other contingency. See GX 8; DX 2-5. The jury was informed of the agreements and warned to receive the witnesses' testimony with caution (IX R. 138-139).

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that the second shipment arrived some weeks before the time the other witnesses testified that it arrived (IX R. 23-25, 31). Reed and Koon also testified about a third importation scheme that was not charged in petitioner's indictment, although they failed to agree on the details surrounding this third transaction (VIII R. 4, 76-78).

2. Petitioner's trial lasted two days. At 2:55 p.m. on the second day, the jury retired to deliberate. At approximately 5:00 p.m. that afternoon, the jury informed the court that it was deadlocked. After summoning counsel, informing them of the jury note, and soliciting their suggestions (IX R. 152-155), the court indicated that it intended to deliver an *Allen* charge to the jury and encourage the jurors to continue their deliberations (Pet. App. A9). Both counsel examined the court's proposed instruction; neither objected to its content and the court thereafter charged the jury (IX R. 155-157; Pet. App. A10-A11).

Approximately one hour later, the jury again communicated with the court. This time, the jury asked that testimony be read "regarding the second plane load of marijuana, specifically what was the testimony concerning [petitioner's] involvement at the landing site, at the stash house and thereafter" (Pet. App. A12). Without summoning counsel or informing them of the jury's note, the court advised the jury "that we have no transcripts available of the testimony and you will have to follow your own recollection" (*ibid*). Forty minutes later, the jury advised the court that it had reached a verdict. Counsel were summoned. At that juncture, the court informed counsel that it had received and responded ex parte to the jury's request. Neither counsel objected to the district court's action (*id.* at A12-A13). The jury's verdict was then announced.

3. On appeal, petitioner objected for the first time to the district court's action in responding to the jury's note, contending that it violated Fed. R. Crim. P. 43(a) and necessitated reversal of her conviction. The court of appeals affirmed (Pet. App. A1-A3). While noting (Pet. App. A2) that "trial judges should always confer with counsel concerning communications with a jury during deliberations," the court added that "failure to follow such procedures is not an automatic *per se* ground for reversal." In so holding,

the court of appeals relied upon *United States* v. *Zielie*, 734 F.2d 1447 (11th Cir. 1984), cert. denied, No. 84-482 (Jan. 21, 1985) where, as in the instant case, the district court had responded ex parte to a jury request —there for "a copy of the [trial] transcript" — by informing the jury that no such transcript had yet been prepared and that the jury "must follow [its] collective recollection of the evidence" (734 F.2d at 1460). Holding that the trial court's action violated Rule 43(a), the *Zielie* court nevertheless concluded that such error was harmless as appellant had failed to demonstrate prejudice. Likewise, the court of appeals here concluded that "[u]nder the facts of this case, we find no reversible error" (Pet. App. A2).

The court of appeals also held that the government's reliance upon the testimony of the five co-conspirators following their entry into plea agreements with the government did not violate due process (Pet. App. A3). Petitioner had relied upon *United States* v. *Waterman*, 732 F.2d 1527 (8th Cir. 1984), in contending that the use of such witnesses violated her right to due process. In *Waterman*, a panel of the Eighth Circuit had concluded that a government promise to recommend leniency for certain prosecution witnesses contingent upon their testimony aiding in defendant's indictment constituted an "invitation to perjury" and thus infringed defendant's right to due process (732 F.2d at 1531). Noting both that the panel's decision in *Waterman* was subsequently vacated and the case set for rehearing en banc[3] and that, in any event, the instant case was factually distinguishable, the court of appeals rejected petitioner's due process claim and affirmed her conviction. "The panel opinion [in *Waterman*] condemns the use of a witness who has entered into an agreement with the government based

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[3]The en banc Eighth Circuit, by an equally divided vote, subsequently affirmed the judgment of conviction in *Waterman* (732 F.2d 1533). A petition for a writ of certiorari is pending in *Waterman* (No. 84-1235).

upon the results of his or her testimony. Without commenting on the opinion, we find no factual support in the record for the argument being made" (Pet. App. A3).

ARGUMENT

1. Petitioner contends (Pet. 8-13) that the district court's failure during jury deliberations to inform her of a jury request to have certain testimony repeated violated her rights under Fed. R. Crim. P. 43(a) and the Due Process Clause and necessitates reversal of her conviction. The court of appeals, however, correctly found (Pet. App. A2) no reversible error in the district court's action. The sole issue is whether petitioner was prejudiced by the trial court's failure to inform her of the exchange with the jury.

Fed. R. Crim. P. 43(a) guarantees to a defendant in a criminal trial the right to be present "at every stage of the trial including the impaneling of the jury and the return of the verdict." In *Rogers* v. *United States*, 422 U.S. 35 (1975), this Court held that this rule requires that jury inquiries during deliberations be "answered in open court" and that defense counsel be afforded "an opportunity to be heard before the trial judge respond[s]" (*id.* at 39). Nevertheless, the Court indicated that not every district court failure to comply with Rule 43 necessitates reversal, observing that such violations "may in some circumstances be harmless error" (*id.* at 40). See also *Rushen* v. *Spain*, 464 U.S. 114 (1983), cert. denied, 464 U.S. 917 (1983); *United States* v. *Yonn*, 702 F.2d 1341, 1344-1345 (11th Cir. 1983); *United States* v. *Dominguez*, 615 F.2d 1093, 1094-1096 (5th Cir. 1980); *United States* v. *Bufalino*, 576 F.2d 446, 451 (2d Cir.), cert. denied, 439 U.S. 928 (1978). Here, although the district court failed on one occasion to comply with Rule 43(a), the error did not prejudice petitioner's "opportunity to defend against the charge." *United States* v. *Gagnon*, No. 84-690 (Mar. 18, 1985), slip op. 5; see *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934).

Petitioner does not dispute that a Rule 43 violation is not reversible error unless it prejudices the defendant's right to a fair trial. Rather, petitioner contends that "[u]nder the unique circumstances of this case" (Pet. 9) the court of appeals erred in concluding that the violation was not reversible error. Application of well-settled principles of determining prejudice to the concededly "unique circumstances of this case" is obviously not a matter warranting this Court's review. But in any event, the court of appeals was correct in its disposition of the matter.

The jury requested that testimony be repeated concerning one of two transactions about which five prosecution witnesses testified over the course of one and one-half days. The grant or denial of such a request is within the broad discretion of the district court. *United States* v. *Zarintash,* 736 F.2d 66, 69-70 (3d Cir. 1984); *United States* v. *Lopez,* 728 F.2d 1359, 1363 (11th Cir. 1984), cert. denied, No. 83-1983 (Oct. 1, 1984); *United States* v. *Birges,* 723 F.2d 666, 671 (9th Cir. 1984), cert. denied, No. 83-6398 (Apr. 16, 1984). As the court of appeals noted (Pet. App. A2), the most common — and permissible — response of trial judges to such a request is to "advise the jury to rely upon its own recollection of the testimony."[4] The exercise of discretion was particularly understandable and appropriate here, since at the time the jury made its request, the court reporter had not yet transcribed the trial testimony (Pet. App. A12). See *United States* v. *Lopez,* 728 F.2d at 1363 (no abuse of discretion where trial judge refuses to recount testimony of two witnesses on specific factual point). Thus, while the district court should, consistent with Rule 43(a), have informed counsel of the jury's request at the time it was

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[4]We thus disagree with petitioner's characterization of this routine exercise of trial court discretion as "a summary deprivation of the defendant's right to have specific testimony re-read" (Pet. 10). Except perhaps in special circumstances (not presented here), the decision is simply one of trial governance, not of the defendant's "right."

first made, that it failed to do so here did not rise to the level of reversible error.

Petitioner's assertion (Pet. 9-10) of a conflict between the decision below and *Rogers* v. *United States, supra,* is, accordingly, unfounded. In *Rogers,* the district court responded to a jury note that "was tantamount to a request for further instructions" without complying with Fed. R. Crim. P. 43(a) (422 U.S. at 39). The court's response, moreover, was substantively incorrect and "fraught with potential prejudice" (*id.* at 41).[5] This Court thus concluded that "the nature of the information conveyed to the jury, in addition to the manner in which it was conveyed," necessitated reversal of petitioner's conviction (*id.* at 40) Here, in contrast, the jury's request was not for additional instruction, but to be read untranscribed excerpts of the testimony of five witnesses. In denying the jury's request in the exercise of its discretion, the district court's response "was purely ministerial, advising the jury that no transcript was available." *United States* v. *Zielie,* 734 F.2d at 1460.[6]

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[5]In *Rogers,* the jury inquired whether the district court would "accept the Verdict — 'Guilty as charged with extreme mercy of the Court.' " The court, without first informing counsel, indicated that it would (422 U.S. at 36 (citation omitted)). This Court observed that not only was the trial court wrong to ignore Rule 43(a) when faced with a request for supplemental instruction, but "[a]t the very least, the [district] court should have reminded the jury that the recommendation would not be binding in any way. * * * In addition, the response should have included the admonition that the jury had no sentencing function * * *" (*id.* at 40).

[6]The appellate decisions petitioner contends (Pet. 10) are in conflict with the decision below are also inapplicable. *United States* v. *Zarintash,* 736 F.2d at 70, involved a jury request for the testimony of a single witness "which occupied a discrete [and short] portion" of an already existing transcript. In *United States* v. *Ronder,* 639 F.2d 931, 934 (2d Cir. 1981), and *United States* v. *Treatman,* 524 F.2d 320, 323 (8th Cir. 1975), as in *Rogers,* jury requests for supplemental instruction were answered without affording counsel the opportunity to comment or object. Finally, in *United States* v. *Rabb,* 453 F.2d 1012 (3d Cir.

The insubstantiality of petitioner's argument is brought home by the reaction of her defense counsel when informed — minutes later — of the jury's request and the court's response. Although the jury's verdict had not yet been rendered, counsel did not raise any objection either to the court's failure to inform petitioner when the incident occurred or to the court's response to the jury. Nor did petitioner raise the issue in post-trial motions, "although post-trial hearings may often resolve this sort of claim" (*United States* v. *Gagnon,* slip op. 6). This suggests strongly that petitioner and defense counsel at the time did not disagree with the trial court's disposition of the jury's request. Their "latter day protests of the District's Court's action with respect to [this] relatively minor incident" (*id.* at 7) should not be accorded much credence. Furthermore, petitioner's failure to object when informed of the incident provides an additional ground for affirmance of the judgment below. See *United States* v. *Young,* No. 83-469 (Feb. 20, 1985), slip op. 13 (in absence of a timely objection to preserve the error for appeal, the "dispositive issue" is not whether there was error, but whether it was "plain error"); *United States* v. *Gagnon,* slip op. 7 ("defendant or his counsel * * * may not claim [a Rule 43 right] for the first time on appeal from a sentence entered on a jury's verdict of 'guilty' ").[7]

1971), the trial court, instead of granting the jury's request to have certain testimony read verbatim, "read its summary of the testimony * * * and added that if the jury had a different recollection of the testimony they should use it to guide them" (*id.* at 1013). Thus, unlike the discretionary refusal at issue here, in *Rabb* the court's insistence on delivering its own summary "raise[d] the possibility that the jury [might have been] given an erroneous view of the testimony * * * (*id.* at 1015).

[7]We are mindful of the distinction between this case and *Gagnon*: in *Gagnon* the defendants were informed in advance of the judge's intentions to communicate in chambers with the juror, whereas here the judge's communications were revealed 40 minutes after they had taken

2. Petitioner also contends (Pet. 14-18), relying exclusively upon the panel decision in *United States* v. *Waterman, supra,* that the government's use of witnesses with whom it had entered into plea agreements violated her right to due process, requiring reversal of her conviction. The *Waterman* decision has since been vacated by the en banc court (732 F.2d at 1533) and therefore no longer stands as authority for petitioner's position. The rationale of the *Waterman* panel decision has also recently been rejected by the First Circuit in *United States* v. *Dailey,* No. 84-1578 (Apr. 5, 1985). There is not, therefore, even a colorable claim of a conflict in the circuits. Moreover, petitioner raised this issue for the first time in her supplemental brief in the court of appeals (Pet. App. A3). Having failed to preserve the issue for appeal, petitioner cannot prevail on it now — unless, as petitioner does not contend, the district court committed plain error. See *United States* v. *Young, supra.*

In any event, the court below did not reject the *Waterman* panel's holding as a matter of law, but simply pointed out that there is "no factual support in the record for the argument" (Pet. App. A3). That conclusion does not warrant this Court's attention, and is clearly correct.

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place. We therefore do not contend that petitioner waived her Rule 43 rights in the sense in which the defendants waived those rights in Gagnon. Nonetheless, this Court in *Gagnon* stressed (slip op. 5-6 (emphasis added)) that the *Gagnon* defendants

> neither then [when the incident occurred] *nor later in the course of the trial* asserted any Rule 43 rights they may have had to attend this conference. * * * No objections of any sort were lodged, *either before or after the conference.* Respondents did not even make any post-trial motions.

Nor did the *Gagnon* defendants lodge any objection to the action taken by the trial court as a result of the in chambers interview with the juror (*id.* at 2). The Court's strictures against these procedural derelictions in *Gagnon* apply equally to the instant case.

In *Waterman* as in this case, the conviction was based in large part on the testimony of the defendant's former confederates, which testimony was obtained as part of a plea agreement. There the resemblance stops. In *Waterman,* the panel's ruling was based upon a finding that the plea agreement was expressly "*contingent upon* the content and results of [the witness's] testimony" (732 F.2d at 1531 (emphasis in original)). The agreement, as interpreted by the trial court in *Waterman,* provided that if the witness's cooperation "led to further indictments" the government would recommend a reduction in sentence, but that if the testimony "did not lead to the indictment of other individuals" the government would not recommend any reduction in sentence (*id.* at 1530). It was on this interpretation of the agreement that the court of appeals panel concluded that the agreement was an "invitation to perjury" and a denial of due process (*id.* at 1531).

The agreement in this case is wholly unlike that described in *Waterman.* The agreement contained no contingency whatsoever; petitioner's co-conspirators were required to provide "truthful testimony" — nothing more. Their fate did not hinge upon whether their testimony tended to inculpate or exculpate petitioner, or upon what the outcome of petitioner's trial might be. Moreover, unlike in *Waterman,* where the court relied upon a conclusion that the government's sole witness significantly expanded his testimony after entry of the plea agreement (732 F.2d at 1532-1533),[8] there is no extrinsic reason to doubt the truthfulness of the testimony of the five government witnesses in this case. Accordingly, unless a plea bargain wherein the government

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[8]As we describe more fully in our brief in opposition to the petition in *Waterman* (No. 84-1235), the various factual suppositions on which the panel rested its ruling were largely unfounded. A copy of our *Waterman* brief has been provided to petitioner.

agrees to a more favorable disposition in return for cooperation or testimony is a violation per se — which not even the *Waterman* panel would hold (732 F.2d at 1531) — the conviction here should be sustained. See *United States* v. *Librach,* 536 F.2d 1228, 1229-1230 (8th Cir.), cert. denied, 429 U.S. 939 (1976).

Petitioner insinuates (Pet. 17) that "[t]here is a substantial factual basis showing that further recommendations for lenient treatment were contingent on the Government's success with the Petitioner's indictment and prosecution" (Pet. 17). However, the sole factual support she offers (*ibid.*) is that co-conspirator Koon obtained "an even more favorable sentencing recommendation on the first day of the Petitioner's trial," thus in her view making it "evident to all five witnesses that 'rewards' for more lenient treatment might be forthcoming at or before their subsequent sentencing hearings if they would please the Government appropriately." Petitioner fails to mention, however, that Koon's recommended sentence was reduced because he had assisted the government as a confidential informant in an unrelated prosecution. See VIII R. 125-126, 149, 152; IX R. 7. Nor does she mention that none of the other four witnesses obtained similar reductions, despite her contention that such reductions were understood to follow in the event she were convicted (which, of course, she was).

The court of appeals, by its recognition that there is "no factual support in the record" for petitioner's claim (Pet. App. A3), rejected petitioner's one-sided view of the events in question. That analysis of the record does not require review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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